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Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. _____

JOE and WANDA KABINTO, his wife; HARRY BAHE; JOHN YELLOWHAIR and MARY ETTA YELLOWHAIR, his wife; MARY KABINTO YESSLITH; INEZ KABINTO NELSON; KATIE NELSON; VINTON NELSON; JACK FRANK and LETA FRANK, his wife; DAVID GEORGE and ELIZABETH REDHORSE GEORGE, his wife; DAN JOE GRAYHAIR and AGNES GEORGE GRAYHAIR, his wife, and ROSE GEORGE BAKER,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Your PETITIONERS above-named petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in this case

on February 18, 1972.

OPINION BELOW

The opinion of the Court of Appeals for the Ninth Circuit is not yet reported, but will appear at ___ F.2d ___ (9th Cir. 1972). The opinion is reprinted in the Appendix to this Petition (A. 1). The Order of the United States District Court for the District of Arizona is unreported, but is reprinted in the Appendix to this Petition (B. 1).

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Ninth Circuit was entered on February 18, 1972 (A. 1). Petition for re-hearing, timely filed, was denied on March 23, 1972 (D-1). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

I. Petitioners assert claims in this action arising from "settlement" by the Secretary of Interior under the Executive Order of 1882, which claims were vested in Petitioners by the Act of July 22, 1958. These claims were denied below on grounds that Healing v. Jones, 210 F. Supp. 125 (D.C. Ariz. 1962), aff'd 373 U.S. 785 (1963), Petition for Writ of Certiorari filed sub. nom. Hamilton v. McDonald, No. ____, October Term, 1971, was res judicata and barred Petitioners' "settlement" claims. Is Healing v. Jones res judicata as to claims of settlement by individual Petitioners when:

A. Petitioners were not named parties, nor were Petitioners notified of the pendency of the action;

B. No finding of fact in Healing v. Jones, or in this case states that Petitioners were adequately represented;

C. The Healing court stated that Petitioners' purported representative

appeared, but that Petitioners' purported representative made no claims on behalf of any individual Navajo Indians, arising from their individual settlement;

D. Petitioners assert claims arising from facts stated in the opinion in Healing v. Jones, which claims of Petitioners based on individual settlement were neither expressly raised nor expressly adjudicated in Healing v. Jones;

E. The failure of Petitioners' purported representative to raise or assert any of Petitioners' individual claims of settlement was held by the Ninth Circuit to be dictated by the Act of July 22, 1958, and for that reason sustained by the Court of Appeals?

II. Petitioners assert valid existing rights of occupancy arising from individual occupancy of specific lands by themselves and their ancestors, which rights arose prior to the 1882 Executive Order. Summary judgment was entered against Petitioners on

these claims on the ground that Healing v. Jones held such claims extinguished by the Act of July 22, 1958, and was res judicata. Was Healing v. Jones res judicata on the question of extinguishment of Petitioners' individual occupancy rights, when such rights were antagonistic to the claims of their purported representative, and when jurisdiction of the District Court constituted by statute to hear Healing was limited by the Act of July 22, 1958, to claims arising from the 1882 Executive Order?

III. Assuming Healing v. Jones is not res judicata as to the individual occupancy rights of Petitioners, did the 1958 Act extinguish such rights, when the 1958 Act did not specifically describe Petitioners' interest and lands, and did not specifically extinguish Petitioners' individual occupancy rights?

IV. Does Section 2 of the Act of July 22, 1958, providing that the Navajo and Hopi Tribes may adjust ownership of 1882 Executive Order reservation lands to conform such ownership to residence patterns of Tribal members, establish a Congressional policy that the two Tribes by negotiation

bear responsibility for protection of individual Indians in the 1882 area, which policy is inconsistent with intervention of Federal Courts, and ousts jurisdiction to order ejectment of Petitioners?

CONSTITUTIONAL PROVISIONS, STATUTES, AND ORDERS INVOLVED

The relevant Constitutional provisions, statutes and orders are as follows:

U.S. Constitution, Amendment V.

> "No person shall *** be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Act of July 22, 1958, Pub. L. 85-547, 72 Stat. 402.

> "AN ACT
>
> "To determine the rights and interests of the Navaho Tribe, Hopi Tribe, and individual Indians to the area set aside by Executive order of December

16, 1882, and for other purposes.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That lands described in the Executive order dated December 16, 1882, are hereby declared to be held by the United States in trust for the Hopi Indians and such other Indians, if any, as heretofore have been settled thereon by the Secretary of the Interior pursuant to such Executive order. The Navaho Indian Tribe and the Hopi Indian Tribe, acting through the chairmen of their respective tribal councils for and on behalf of said tribes, including all villages and clans thereof, and on behalf of any Navaho or Hopi Indians claiming an interest in the area set aside by Executive order dated December 16, 1882, and the Attorney General on behalf of the United States, are each hereby authorized to commence or defend in the United States District Court for the District of Arizona an action

against each other and any other tribe of Indians claiming any interest in or to the area described in such Executive order for the purpose of determining the rights and interests of said parties in and to said lands and quieting title thereto in the tribes or Indians establishing such claims pursuant to such Executive order as may be just and fair in law and equity. The action shall be heard and determined by a district court of three judges in accordance with the provisions of title 28 United States Code, Section 2284, and any party may appeal directly to the Supreme Court from the final determination by such three judge district court.

"SEC.2. Lands, if any, in which the Navaho Indian Tribe or individual Navaho Indians are determined by the court to have the exclusive interest shall thereafter be a part of the Navaho Indian Reservation. Lands, if any, in which the Hopi Indian Tribe, including any Hopi village or

clan thereof, or individual Hopi Indians are determined by the court to have exclusive interest shall thereafter be a reservation for the Hopi Indian Tribe. The Navaho and Hopi Tribes, respectively, are authorized to sell, buy, or exchange any lands within their reservations, with the approval of the Secretary of the Interior, and any such lands acquired by either tribe through purchase or exchange shall become a part of the reservation of such tribe.

"SEC. 3. Nothing in this Act shall be deemed to be a congressional determination of the merits of the conflicting tribal or individual Indian claims to the lands that are subject to adjudication pursuant to this Act, or to affect the liability of the United States, if any, under litigation now pending before the Indian Claims Commission.

"Approved July 22, 1958."

Executive Order of December 16, 1882.

"Executive Mansion,
December 16, 1882.

"It is hereby ordered that the tract of country, in the territory of Arizona, lying and being within the following described boundaries, viz: beginning on the one hundred and tenth degree of longitude west from Greenwich, at a point 36° 30' north, thence due west to the one hundred and eleventh degree of longitude west, thence due south to a point of longitude 35° 30' north; thence due east to the one hundred and tenth degree of longitude west, thence due north to the place of beginning, be and the same is hereby withdrawn from settlement and sale, and set apart for the use and occupancy of the Moqui, and such other Indians as the Secretary of the Interior may see fit to settle thereon.

CHESTER A. ARTHUR."

STATEMENT OF THE CASE

This is an action in ejectment, brought by the United States to eject Petitioners from their lands which are located within the exterior boundaries of the Hopi Indian Reservation, commonly known as District 6. This litigation is a part of a land dispute which has a long history, which remains unresolved, and which involves about 1,900,000 acres of land. Healing v. Jones, 210 F. Supp. 125 (D.C. Ariz. 1962), aff'd per curiam 373 U.S. 785 (1963), Petition for a Writ of Certiorari to the Court of Appeals of the Ninth Circuit pending, sub nom Hamilton v. McDonald, October Term, 1971, No. ____, and the Act of July 22, 1958, are all parts of the attempt to resolve this dispute. The history of the dispute is involved, and lengthy.

In 1882, on December 16, President Arthur issued an executive order which reserved an area one degree of latitude by one degree of longitude, "for the Moqui (Hopi) and such other Indians as the Secretary of the Interior may see fit to settle thereon." At that time, many Navajo

Indians lived in the reserved area; Petitioners' ancestors were included among those Navajos. Affidavits filed by Petitioners in opposition to the United States' motion for summary judgment indicate Petitioners' ancestors occupied the area from at least 1868. Despite expansion of the land area of their reservation from the original reservation, Navajos remained short of land. Pressures on existing areas and the fact that the Executive order area was historically used by Navajos led to continued expansions of Navajo use of the area. Navajos used the area intensively, while Hopis, who remained on the three mesas which were their homelands, claimed the right to the entire area without utilizing much of it.

The protracted dispute proved intractable. The Act of July 22, 1958, took another avenue to solution; the judiciary. The Act vested equitable title in the Hopis and such other Indians as the Secretary had heretofore settled in the 1882 Executive Order area. It waived sovereign immunity of the United States, the Hopi Tribe, and the Navajo Tribe, constituted a three-judge

court, and provided for a lawsuit, in which the claims of the tribes, the claims of individual Indians, arising from the 1882 Order or settlement pursuant to the Order, were to be made, and adjudicated. Title was to be quieted. The two tribes, alone among the Indian tribes in the United States, were given power to deal in their own lands to adjust boundaries following the litigation to conform to patterns of actual occupancy.

The suit brought pursuant to the special act was Healing v. Jones. Healing fixed boundaries of District 6, the Hopi Reservation, on the basis of a 1943 boundary survey and report; Petitioners claim in fact this report settled them on their present lands, as individuals. The boundary fixed includes Petitioners' lands within the so-called "exclusive" Hopi Reservation. Healing also held as a finding of fact that the Chairman of the Navajo Tribe presented no individual's claims to lands in the 1882 area. The Chairman, Paul Jones, was appointed the representative of individual Navajos claiming lands in the area by the Act of Congress, the Act of July 22, 1958.

The United States brought this action under 28 U.S.C. § 1345, to eject Petitioners. Summary judgment was granted the United States, and affirmed by the Ninth Circuit, on the grounds that Petitioners' claims of rights paramount to the Hopi Tribe's asserted rights were barred by Healing v. Jones, under the doctrine of res judicata. On March 23, 1972, Petitioners' application for rehearing was denied.

Petitioners asserted two alternative rights, contending that either established their right to use the land, and defeated the Hopi claim asserted by the United States. The first claim was that under Cramer v. U.S., 261 U.S. 219 (1923), and related cases, the lands upon which Petitioners reside were withdrawn from the public domain prior to the Executive Order of 1882, and that Petitioners have present, vested and unimpaired rights. Cramer held long continued use of public domain by individual Indians who remain on the land and use it year to year, month to month, withdraws the land from any adverse disposition by any one but the Congress of the United States. Petitioners contend that under the authority

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of Leavenworth L&G RR v. U.S., 92 U.S. 733 (1875); U.S. v. Minnesota, 270 U.S. 181 (1926); and Ma-gee-see v. Johnson, 30 L.D. 125 (1900), Congress did not validly exercise its power to divest by enacting the Act of July 22, 1958.

Petitioners' second and alternative claim was that, based on facts stated in Healing v. Jones, Petitioners were validly settled as individual Navajos in the 1882 area on the lands they occupied and used, and that Petitioners' rights were vested by the 1958 Act.

Petitioners' claims of Cramer occupancy rights were held barred by res judicata, in that Healing v. Jones held all claims other than those arising from the 1882 Executive Order or settlement by the Secretary were extinguished by the Act of July 22, 1958. Petitioners' claims of rights arising from settlement of them as individuals were also held barred by res judicata and Healing, which admittedly said Petitioners' lands were within the Hopi District 6 Reservation area, even though Petitioners' claims were not made in Healing.

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REASONS FOR GRANTING THE WRIT

1. Healing v. Jones involves, in the words of the opinion, "the greatest title problem of the West". 210 F. Supp. at 129. Involved are about 1,900,000 acres of land, and homes and land of about 10,000 Navajos. Healing v. Jones and the Act of July 22, 1958, were hoped-for solutions which have not worked. Healing, sub. nom. Hamilton v. McDonald, No. ____, is again before this Court. H.R. 11128, introduced by Congressman Steiger, is pending in Congress. Both the application for a Writ of Assistance of Hamilton, the Hopi Tribal Chairman, upon which proceeds are pending in this Court, and H.R. 11128 would partition the area and remove 1/2 of the Navajos residing in the partitioned area. Both "solutions" are based on Healing v. Jones, and at present the biggest title problem of the West centers around this decision.

Petitioners contend that they possess rights which are vested and unimpaired, arising from Cramer v. United States, 261 U.S. 219 (1923), which rights are a cloud on the entire proceedings in Healing.

Petitioners also claim, alternatively, rights arising from Secretarial Settlement. Before the latter rights, which are vested under the Act of July 22, 1958 can be asserted, Healing v. Jones must be held not binding on Petitioners. Petitioners claim that Healing v. Jones binds neither them nor any other Navajos in the 1882 area because no individual Navajo's claims were ever presented in Healing, and because the representative appointed for them by Congress, the Chairman of the Navajo Tribe, in fact did not represent them. Neither Healing nor this case have any findings of fact that Petitioners were adequately represented. Petitioners claim that Healing v. Jones has no binding effect as to the claims of individual Navajos to vested rights in the 1882 Executive Order area because no such claims were made by their representative and because no such claims were adjudicated by the court in Healing.

These circumstances, no individual's claims made or expressly adjudicated, and no finding of fact of adequate representation, violate the due process clause and deprived Healing v. Jones of any binding

effect upon Petitioners.

Petitioners also contend that the Act of July 22, 1958 contains provisions which, for Petitioners' protection, require that the two tribes primarily interested in the lawsuit arrange reservation ownership to assure them lands for livelihood before removal from any lands could occur. These provisions make evident the Congressional intent to preclude the coercive intervention of the courts, and to remove the remedy sought herein from the relief which could be granted by courts generally, by denying them jurisdiction.

Questions basic to the administration of the 1882 area and to resolution of the land dispute involving the two tribes, the United States as trustee, and the lands and livelihoods of many illiterate individuals suffering from this dispute, are presented by this case. The resolutions of these questions by the Court of Appeals are inadequate and incorrect, as appears below.

2. Healing v. Jones is an untenable resolution of a serious problem, and should be held without effect on rights of individual

Navajos. The Act of July 28, 1958 vested rights in all individual Indians settled in the 1882 area. Healing held all individual Navajos in the 1882 area residing therein on July 22, 1958, settled therein. The individual Navajos there thus have vested rights, individually. Healing also held the area of the 1882 reservation outside District 6 was a joint and undivided, share and share alike, tenancy between the two tribes.

At the time of the decision, much more than 1/2 of the joint interest area was occupied by individual Navajos with vested rights. The rights of the two tribes, and the vested rights of the individual settled Navajos are in inexorable conflict. Any partition would mean the removal of some Navajos from the lands in which they have a vested beneficial interest. What criterion consistent with equal protection appears to sustain the choice of one Navajo residing in the joint interest area as the victim of Indian Removal, over another similarly situated Navajo? In fact, the failure of Paul Jones, Chairman of the Navajo Tribe, to adequately represent individual claimants

now places some of the Navajo in the area in the cruel danger of being uprooted if the tribal government's claims to one half of the land are effectuated.

3. Healing v. Jones is not binding upon Petitioners, and is not a bar to claims of individual settlement in the 1882 area by the Secretary of Interior. Petitioners' facts supporting the claim of inadequate representation are that: Finding of Fact No. 13 in Healing v. Jones (App.C) states that no claims of individual settlement were made by the Chairman of the Navajo Tribe, that the reason no individual claims were made was that Petitioners' rights were inexplicibly asserted by the Plaintiff, the Hopi Tribe of Indians, 210 F. Supp. 151, and denied by the Defendant, Petitioners' purported representative, that no claims of named individuals were discussed or adjudicated in the opinion in Healing v. Jones, or in the findings of fact and conclusions of law (App.C).

There are no findings of fact in Healing v. Jones that Petitioners or all individual Navajo claimants were adequately represented;

necessarily in this summary judgment, there are none. Petitioners assert that under Hansberry v. Lee, 366 U.S. 683 (1961) and Sam Fox Publishing Co. v. United States, 366 U.S. 683 (1961), findings of fact in Healing that Petitioners were adequately represented are required before Healing can be binding. The due process clause of the Fifth Amendment requires that before parties to a "representative" suit can be bound thereby, there must be a finding of fact of adequate representation.

When it appears that Petitioners' claims were in fact not presented or adjudicated in Healing v. Jones, Petitioners have made a sufficient showing to create a question of fact precluding summary judgment based on res judicata. See Old Grantian Co. v. William Grant & Sons, Ltd., 361 F.2d 1018 (Cust. & Pat.App. 1966). The fact that Petitioners' claims were asserted by the Hopi Tribal Chairman in Healing is not discussed by the Court of Appeals opinion, and the disposition of the issue involves an assumption of fact by the Court of Appeals. The opinion states: "The reason why the claims of individual Navajos

were made...." Jones asserted one unitary complete Tribal claim, and said the individuals in the 1882 Area were claimed beneficiaries as members of the Navajo Tribe. Yet § 2 of the Act of July 22, 1958, provides that lands in which individual Navajo Indians are held to have exclusive rights are to be a part of the Navajo Reservation. Further, § 1 of the Act speaks of "any Navajo or Hopi Indians claiming an interest in the area set aside by Executive order dated December 16, 1882, ..." Congress intended that the individual claims of real individually named Navajo Indians would be brought before the Court, not that Paul Jones would assert only a Tribal claim, and then state the individuals in the 1882 Area who were members of the Tribe had rights, because they were tribal members. The decision of the Court of Appeals is contrary to the Act of July 22, 1958, and Congressional recognition that individual Navajos might have exclusive vested rights under § 1 of the Act. Further, even if, as the Court of Appeals indicates, Paul Jones' strategy was dictated by the mandate of Congress, can the mandate validate the failure to present individual

claims, when Congress has appointed Paul Jones as Petitioners' representative? If Congress mandated that Paul Jones represent Petitioners because Petitioners might have vested rights under § 1 of the Act of July 22, 1958, then mandated that Paul Jones not present any of Petitioners' individual claims, either the Act of July 22, 1958 is a mockery, or violative of the Fifth Amendment.

4. Petitioners submitted affidavits in response to the Motion of the United States for Summary Judgment below which indicate Petitioners and their ancestors had resided upon the lands in dispute in this litigation, for many years prior to 1882, on a day-to-day basis as residences. Petitioners are still using the lands for residence today. In Cramer v. U.S., 261 U.S. 219 (1923), the Supreme Court held that Indians who settle on the public domain and establish residency thereby acquire rights of possession. Cramer further states: "Since these Indians...had acquired such rights of occupancy as entitled them to retain possession as against the defendants, no officer or agent of the government had authority to

deal with the land upon any other theory." 261 U.S. at 234. In United States v. Santa Fe Pacific R.R. Co., 314 U.S. 339 (1941), this Court held an Act of Congress was required to extinguish Cramer rights, and that mere executive action could not do so. Thus, Cramer rights of individual Indians are a more secure form of title than Executive Order title. Further, Cramer rights are vested, and compensation must be paid for their taking. In the opinion of the Court of Appeals, Petitioners claims are characterized as "aboriginal claims" and the opinion cites many cases relating to takings of Tribal aboriginal rights. These cases are inapplicable to Cramer claims of individual rights in the public domain, because there is an established distinction between Tribal claims to vast areas, and individual claims to small tracts used for residence purposes. Tee-Hit-Ton Indians v. United States, 348 U.S. 272, Note 18, p. 285; Carino v. Insular Government of the Philippine Islands, 212 U.S. 449 (1909).

Such long term residence removes the lands from the class of unreserved public domain, and the lands are impliedly excepted

from any subsequent withdrawals of public domain. Petitioners lands were excepted from the lands withdrawn for the use of the Hopi by the 1882 Executive Order. Johnson v. M'Intosh, 8 Wheat. 543, 5 L.Ed. 681 (1823); Leavenworth, L.& G. R. Co. v. United States, 92 U.S. 733 (1875); United States v. Minnesota, 270 U.S. 181 (1926); Ma-gee-see v. Johnson, 30 L.D. 125 (1900).

Healing v. Jones, as construed below, held that Petitioners' claims were extinguished by the 1958 Act. Petitioners' lands were excepted from the 1882 Executive Order. Section 1 of the Act of July 22, 1958, "provides for the conversion of the present interest of the Indians under the Executive Order of December 16, 1882 into a trust title, ..." Report of the Committee on Interior and Insular Affairs, Report No. 1942, 85th Cong. 2d Sess. Congress only intended that rights under the Executive Order were affected; Petitioners' interests under the Cramer doctrine were not under the 1882 Executive Order area.

Healing v. Jones cannot be res judicata as to these claims of Petitioners, because

the Petitioners' claims would reduce the potential area of the representative's reservation under § 2 of the Act of July 22, 1958. This conflict, i.e. that Petitioner's claims would reduce the claims of Petitioners' representative, denies Healing binding effect on whether Petitioners' Cramer claims were extinguished. The decision of the Court below conflicts with Provident Tradesmans Bank and Trust Co. v. Patterson, 390 U.S. 102 (1968).

The Act of July 22, 1958, § 1, is limited to interests which are under the 1882 Executive Order. No other interests could be presented as claims in the lawsuit, as the consent of the United States to be sued extended only to claims under the 1882 Act. The parties in this case are all sovereigns immune from suit, and Cramer rights could not be asserted against them. Uarte v. United States, 7 FRD 705 (S.D. Cal. 1948); Munro v. United States, 303 U.S. 36, 41 (1938). Petitioners' claims were thus beyond the jurisdiction of the court, and the decision in Healing v. Jones cannot bind them. Petitioners' claims remain outstanding and entitle them to occupancy of the

lands they now use, without interference by the Hopi Tribe of Indians. The Act of 1958 did not operate to extinguish Petitioners' Cramer rights. An act of congress is required to extinguish such rights. However, the Act, Petitioners contend, must specifically mention the individual interests to be extinguished, which the Act of July 22, 1958 fails to accomplish. The leading case on this question, Leavenworth L. & G. R. Co. v. United States, supra, held that specific mention of the Indian rights and express extinguishment of those rights must occur before any statute will be effective to extinguish Indian rights to land. See also, United States v. Santa Fe Pacific R.R. Co., supra. The decision of the Circuit Court below conflicts which these cases, because it implies that Petitioners' rights were extinguished. Such a rule additionally could result in losses of Indian lands inadvertently, and is contrary to the basic Federal polciy of solicitude for and protection of the rights of Indians.

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5. Just as Congress can limit the jurisdiction of inferior federal courts, it can limit the relief available through those courts. This is exactly what was done in the Act of July 22, 1958. Congress gave a specially impanelled three-judge district court jurisdiction to entertain an action to determine the rights and interests of the parties and to quiet title to the land in the 1882 Executive Order area. In § 2 of the Act, Congress withheld any enforcement action by the courts, and placed the responsibility for effectuating the decision on the Hopi and Navajo Tribes. This provision was designed to assure that individual tribal members were not left homeless as a result of the litigation. The two Tribes were authorized to sell, buy or exchange lands, with the approval of the Secretary of the Interior, to effectuate the decision.

Allowing one tribe, through the United States, to invoke judicial power allows that tribe to evade its responsibilities of good faith co-operation to protect the individuals of both tribes from being left landless. Moreover, it allows the inferior

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federal court to go beyond that power which was given to it by Congress.

When the Act of July 22, 1958 was enacted, Congress was aware that the Hopis claimed that the Navajos were without any rights to the Executive Order area. The possibility that 8,800 Navajos would be left after the litigation without title thus existed. A construction of the Act of July 22, 1958, which would allow the exercise of judicial power in ejectment of 8,800 Navajos raises the possibility of appalling litigation. We would not impute to the Congress the abandonment of concern for the welfare of Indians who might be displaced by the litigation. The Supreme Court, as long ago as 1856, held that the time of Indian Removal was an Executive matter, that Indians living on ceded reservations would be allowed to stay on the reservations, even against those asserting good legal title, until the Executive removed them. The intervention of courts of justice and the removal litigation was called an appalling prospect. Fellows v. Blacksmith (19 How. 1856) 60 U.S. 366, 371.

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CONCLUSION

It is for the foregoing reasons that this petition for a writ of certiorari should be granted.

Respectfully submitted,

DONALD KLEIN, JR.

CLIFFORD J. HOFFMANN

DALE H. ITSCHNER and

WARREN L. BACHTEL

Counsel for Petitioners

APPENDIX "A"

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

JOE and WANDA KABINTO, his wife; HARRY BAHE; JOHN YELLOWHAIR and MARY ETTA YELLOWHAIR, his wife; MARY KABINTO YESSLITH; INEZ KABINTO NELSON; KATIE NELSON; VINTON NELSON; JACK FRANK and LETA FRANK, his wife; DAVID GEORGE and ELIZABETH REDHORSE GEORGE, his wife; DAN JOE GRAYHAIR and AGNES GEORGE GRAYHAIR, his wife; and ROSE GEORGE BAKER,
Defendants-Appellants.

No. 26,235

[February 18, 1972]

Appeal from the United States District Court
for the District of Arizona

Before: BROWNING and HUFSTEDLER, Circuit Judges, and FERGUSON,* District Judge

PER CURIAM:

This is an appeal from a summary judgment of ejectment declaring 16 Navajo Indians to be trespassers upon a portion of the Hopi Indian Reservation and enjoining them from using or occupying the land. We affirm.

The background of the litigation:

1. In 1882, President Chester A. Arthur by executive order set aside a two and one-half million acre tract in northeastern

*Hon. Warren J. Ferguson, United States District Judge, Central District of California, sitting by designation.

Arizona for the use and occupancy of the Hopi Tribe "and such other Indians as the Secretary of the Interior may see fit to settle thereon".

2. For many years thereafter the Hopi and Navajo Indians asserted conflicting claims to the tract. All attempts to resolve the controversy by agreement and administrative action failed.

3. Finally, the two tribes, the Secretary of the Interior and Congress determined that resort must be had to the courts.

4. A special jurisdictional statute, the Act of July 22, 1958, 72 Stat. 403, was passed "to determine the rights and interests of the Navaho Tribe, Hopi Tribe, and individual Indians to the area set aside by Executive order of December 16, 1882 . . . ."

5. Section 1 of the Act provided that the land was to be held by the United States in trust for the Hopi Indians and such other Indians, if any, as theretofore had been settled thereon by the Secretary of the Interior pursuant to the executive order.

6. The Act further authorized the "Navaho Indian Tribe and the Hopi Indian Tribe, acting through the chairmen of their respective tribal councils for and on behalf of said tribes, including all villages and clans thereof, and on behalf of any Navaho or Hopi Indians claiming an interest in the area . . . and the Attorney General on behalf of the United States . . . to commence or defend . . . an action . . . for the purpose of determining the rights and interests of said parties in and to said lands and quieting title thereto in the tribes or Indians establishing such claims pursuant to such Executive order as may be just and fair in law and equity".

7. It provided that the action was to be heard and determined by a three-judge district court with direct appeal to the Supreme Court.

8. The result was *Healing v. Jones*, 210 F. Supp. 125 (D.Ariz. 1962), *aff'd, per curiam*, 373 U.S. 758 (1963), in which judge Hamley described the controversy as " 'the greatest title problem of the West' ". 210 F. Supp. at 129.

9. The *Healing* court, *inter alia*, quieted title to all the lands within Land Management District 6 in favor of the Hopi Indians, and stated as an unprophetic conclusion, "Under the judgment

being entered herein . . . district 6 . . . will be completely removed from controversy, having been awarded exclusively to the Hopi Indian Tribe". 210 F. Supp. at 192.

10. The appellants, who are Navajo Indians residing within that district 6, refuse to concede the validity of the judgment in *Healing*.

11. That refusal caused this litigation. The United States brought the action in its capacity as sovereign and as trustee for the Hopi Tribe to evict the appellants. The case was determined on the motion of the United States for summary judgment and the Navajos' motion in opposition and an alternative motion for summary judgment. The district court granted the motion of the United States and rejected the contentions of appellants.

On appeal appellants assert (1) the subject matter of the litigation is not judicially cognizable; (2) their right to aboriginal occupancy of the land was not extinguished by *Healing;* (3) they were inadequately represented in *Healing;* (4) the Act of July 22, 1958, and *Healing* deprived them of property without due process of law; and (5) the United States must do equity.

The principal contention of appellants is that they hold title to the land they occupy under a claim of aboriginal right of occupancy which was not extinguished by *Healing*. They assert that they possess rights of occupancy which arose prior to the 1882 Executive Order which are outside the Act of 1958 and *Healing*, both of which were based on the executive order. In support of their contention, affidavits were filed which set forth the fact that the appellants are direct descendants of Navajos who had resided on the lands prior to 1882. The district court determined that the appellants' claim of aboriginal title did not defeat the motion for summary judgment and the affidavits were immaterial as a matter of law.

The primary claim advanced by the Navajos in *Healing* was that occupancy "in Indian fashion" constituted settlement under the language of the 1882 Executive Order, and "liken[ed] the character and use and occupancy by 'other Indians' contemplated by the executive order to that which must be found to exist in order to establish aboriginal Indian title", as such title was defined in *United States v. Santa Fe Pacific R. Co.*, 314 U.S.

339 (1941). 210 F. Supp. at 143. The Hopi Chairman contended that the concept of aboriginal title had no relevancy in the determination of the litigation, asserting that before any Navajo Indian acquired any right in the tract he must first have been permitted by the Secretary of the Interior to enter upon and then physically occupy it. 210 F. Supp. at 144. However, the court, in *Healing*, rejected both contentions and specifically determined that Indians other than the Hopis acquired rights in the land (1) if they occupied the area in Indian fashion as a permanent residence and (2) if such occupancy was without advance permission by the Secretary of the Interior, it was authorized subsequently by the Secretary. 210 F. Supp. at 144.

The principal discussion of *Healing* was a determination of whether the Secretary had ever authorized occupancy by the Navajos. The court found that Navajo Indians used and occupied parts of the 1882 reservation in Indian fashion as their continuing and permanent area of residence long prior to the creation of the reservation in 1882, but that their rights had not become vested until the passage of the Act of 1958. 210 F. Supp. at 144-145. With reference to district 6, *Healing* determined that in 1940 there were 160 Navajos residing there. 210 F. Supp. at 160 n. 44. However, the court specifically found that "neither the Navajo Indian Tribe nor individual Navajos were authorized [by the Secretary] to settle within" district 6. 210 F. Supp. at 173.

In its unreported conclusions of law, the *Healing* court determined:

> "Neither the Navajo Indian Tribe nor any individual Navajo Indians, whether or not living in the reservation area in 1882, gained any immediate rights of use and occupancy therein by reason of the issuance of the Executive Order of December 16, 1882, or by reason of any other fact or circumstance, save and except by the exercise, after December 16, 1882, of the authority reserved in the Secretary of the Interior, under the Executive Order of December 16, 1882, to settle other Indians in that reservation."

It thus appears that the claims which appellants make here with reference to aboriginal claims were raised and considered at

length by the *Healing* court and decided adversely to them. Appellants stress the fact that nowhere in the *Healing* opinion is there a discussion of *Cramer v. United States*, 261 U.S. 219 (1923). In *Cramer*, the Supreme Court held that Indians who settle upon the public domain and establish residency thereby acquire rights of possession. *Cramer*, as was *United States v. Santa Fe Pacific R. Co., supra*, was an action brought by the United States to protect Indian title against third parties who also claimed interests from the United States. The question was not the power of the government to extinguish aboriginal Indian title, but whether that power was exercised. *Healing* determined that it had been.

The judgment in *Healing* is *res judicata*, is not subject to collateral attack save for fraud, and is a bar to the claims of the appellants. "The rule [of *res judicata*] provides that when a court of competent jurisdiction has entered a final judgment on the merits of a cause of action, the parties to the suit and their privies are thereafter bound 'not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose.' *Cromwell v. County of Sac*, 94 U.S. 351, 352." *Commissioner v. Sunnen*, 333 U.S. 591, 597 (1948).

The United States has the power to extinguish Indian title, *i.e.*, the aboriginal right of occupancy. *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543 (1823); *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903); *United States v. Mil. Lac Chippewas*, 229 U.S. 498 (1913); *Chippewa Indians v. United States*, 301 U.S. 358 (1937). "The power of Congress in that regard is supreme." *United States v. Santa Fe Pacific R. Co., supra*, at 347. *Healing* found that Congress effectively extinguished all Navajo claims, including aboriginal, and converted them into vested rights upon court determination.

The argument that the subject matter of the litigation must be left for the determination of Congress and, therefore, beyond judicial cognizance was raised in a prior proceeding of *Healing*, *Healing v. Jones*, 174 F. Supp, 211 (D.Ariz. 1959). The same three-judge district court held that Congress by the Act of July 22, 1958, properly assigned the judicial task involved in *Healing*.

174 F. Supp. at 216. The first *Healing* decision rejected the challenge to its jurisdiction, and that rejection is *res judicata* to the position again advanced by the appellants here.

The third argument made by appellants is that they are not bound by the adverse ruling in *Healing* because they were not adequately represented. That claim arises from the fact that in *Healing* the Chairman of the Navajos made no claim on behalf of any individual Navajo Indian except as beneficiary of the Navajo tribal claim. 210 F. Supp. at 132. From this, appellants assert that although Paul Jones, the Chairman, appeared on appellants' behalf, he made no claim on their behalf. The reason why the claims of individual Navajos were made as beneficiaries under the Navajo tribal claim is that the Act of July 22, 1958, provided in Section 2 that "Lands, if any, in which the Navaho Indian tribe or individual Navaho Indians are determined by the court to have the exclusive interest shall thereafter be a part of the Navaho Indian Reservation". The strategy of the Chairman of the Navajos was dictated by the mandate of Congress, and not by reason of any conflict of interest, for Congress determined the rights of the Navajos to be tribal.

The contention that the extinguishment of appellants' aboriginal rights deprived them of property without just compensation is again a matter which is rendered *res judicata* by *Healing*. *Healing* determined that appellants had no claims which were cognizable under the law, and therefore not compensable. In effect, appellants are rearguing *Healing*. The Supreme Court has affirmed *Healing*, which is now final and binding upon this court and all other courts. Furthermore, in *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 (1955), the Supreme Court determined that aboriginal title is only a permissive right of occupancy which may be extinguished at the will of Congress. Aboriginal title "is not a property right but amounts to a right of occupancy which the sovereign grants and protects against intrusion by third parties but which right of occupancy may be terminated and such lands fully disposed of by the sovereign itself without any legally enforceable obligation to compensate the Indians". 348 U.S. at 279.

Lastly, the appellants claim that the United States in order to be entitled to a judgment of ejectment must be required to pro-

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vide them with lands of equivalent area and quality. Without determining whether their contention is correct the argument must be resolved against appellants, as the issue is raised for the first time on appeal. The general rule in this circuit is that a district court will not be reversed on a contention that was never presented to it. *Walker v. Continental Life & Accident Company*, 445 F.2d 1072 (9th Cir. 1971). However, the relationship between the United States and appellants is like that of a guardian to his ward. *See Rockbridge v. Lincoln*, ... F.2d ..... (No. 25,437, 9th Cir., Sept. 1, 1971). There is nothing in the record to suggest that the United States will not fulfill its fiduciary obligations to appellants when this litigation is concluded.

The judgment is, therefore, affirmed.

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APPENDIX "B"

APPENDIX "B"

Filed
May 4 1970
W.J.Furstenau, Clerk
United States District
Court
For the District of
Arizona

By _____
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

UNITED STATES OF AMERICA, Plaintiff, vs. JOE KABINTO and WANDA KABINTO, his wife, et al., Defendants.	)	NO. CIV. 6141-PHX.(WEC) JUDGMENT and ORDER

This cause having come on to be heard on motion of plaintiff for a summary judgment pursuant to Rule 56, Federal Rules of Civil Procedure, the Court has considered the pleadings in the action, the memoranda of counsel and the decision and judgment of the United States District Court for the District of Arizona in Healing v. Jones,

210 F. Supp. 125 (1962), affd. 373 U.S. 785 (1963). Healing v. Jones, supra, quieted title to the lands in question in the Hopi Indians, subject to the trust title of the United States, and extinguished all claims of any right, title or interest of the defendants and of the Navajo Tribe to such lands. This Court has heard oral argument and has found that there is no genuine issue of fact to be submitted to the Court, and this Court has concluded the plaintiff is entitled to judgment as a matter of law. Therefore, it is hereby

ORDERED that plaintiff's motion for summary judgment is in all respects granted and that the defendants' cross motion for summary judgment is denied, and it is further

ORDERED, ADJUDGED AND DECREED, that each of the defendants herein is a tresspasser upon the Hopi Reservation, in that part of the Executive Order Reservation of December 16, 1882 lying within Land Management District 6 as defined on April 24, 1943, and as more particularly described in paragraph 1 of the judgment in Healing v. Jones, supra, and it is further

ORDERED, AJUDGED AND DECREED, that a writ of ejectment may issue against the defendants and each of them requiring their removal from said exclusive Hopi Indian Reservation known as Land Management District 6, and it is further

ORDERED, ADJUDGED AND DECREED, that the defendants and each of them are hereby permanently enjoined from disturbing the Hopi Tribe and the members thereof in their ownership and possession of said real property and from any future trespass in any manner whatsoever within the boundaries of said exclusive Hopi Reservation, known as Land Management District 6.

Defendants are hereby allowed until June 27, 1970 to file any motions they deem appropriate or to perfect an appeal from this order.

DATED this 27th day of April, 1970.

Walter E. Craig
United States District Judge

APPENDIX "C"

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

DEWEY HEALING, CHAIRMAN OF THE HOPI TRIBAL COUNCIL OF THE HOPI INDIAN TRIBE, FOR AND ON BEHALF OF THE HOPI INDIAN TRIBE, INCLUDING ALL VILLAGES AND CLANS THEREOF, AND ON BEHALF OF ANY AND ALL HOPI INDIANS CLAIMING ANY INTEREST IN THE LANDS DESCRIBED IN THE EXECUTIVE ORDER DATED DECEMBER 16, 1882,

Plaintiff,

vs.

PAUL JONES, CHAIRMAN OF THE NAVAJO TRIBAL COUNCIL OF THE NAVAJO INDIAN TRIBE FOR AND ON BEHALF OF THE NAVAJO INDIAN TRIBE, INCLUDING ALL VILLAGES AND CLANS THEREOF, AND ON BEHALF OF ANY AND ALL NAVAJO INDIANS CLAIMING ANY INTEREST IN THE LANDS DESCRIBED IN THE EXECUTIVE ORDER DATED DECEMBER 16, 1882; ROBERT F. KENNEDY, ATTORNEY GENERAL OF THE UNITED STATES, ON BEHALF OF THE UNITED STATES,

Defendants.

No. Civil 579 Prescott

The court having considered all of the evidence and being fully advised makes and enters the following findings of fact and conclusions of law.

FINDINGS OF FACT

Jurisdiction

1. This United States District Court for the District of Arizona, comprised of three judges and convened in the manner authorized by section 1 of the Act of July 22, 1958, 72 Stat. 402, and 28 U.S.C., section 2284, has jurisdiction to entertain and determine this action.

Parties

2. Plaintiff Dewey Healing is the duly authorized chairman of the Hopi Tribal Council of the Hopi Indian Tribe and appears herein for and on behalf of said tribe, including all villages and clans thereof, and on behalf of any and all Hopi Indians claiming any interest in the lands described in paragraph 4 of these findings of fact.

3. There are two defendants one of whom is Paul Jones, the duly authorized chairman of the Navajo Tribal Council of the Navajo Indian Tribe. He appears herein for and on behalf of said tribe and every member thereof, and for each and every Navajo Indian using and occupying, or who has or has had any claim of any right, title or interest in the use and occupancy of, any part, parcel or portion of the lands described in paragraph 4 of these findings of fact. The other defendant is the Attorney General of the United States, on behalf of the United States.

Nature of the Case

4. At issue in this action are the competing claims of the Navajo and Hopi Indians and their respective tribes in and to the lands described in an executive order issued on December 16, 1882, by President Chester A. Arthur. This order reads:

"Executive Mansion,
December 16, 1882.

"It is hereby ordered that the tract of country, in the territory of Arizona, lying and being within the following described boundaries, viz: beginning on the one hundred and tenth degree of longitude west from Greenwich, at a point 36° 30′ north, thence due west to the one hundred and eleventh degree of longitude west, thence due south to a point of longitude 35° 30′ north; thence due east to the one hundred and tenth degree of longitude west, thence due north to the place of beginning, be and the same is hereby withdrawn from settlement and sale, and set apart for the use and occupancy of the Moqui, and such other Indians as the Secretary of the Interior may see fit to settle thereon.

CHESTER A. ARTHUR."

5. By inadvertence the land description set out in the order of December 16, 1882, makes reference to "longitude 35° 30′

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north," whereas the reference should have been to "latitude 35° 30′ north." As correctly described the tract, situated in what is now northeastern Arizona, is rectangular, being about seventy miles long, north to south, and fifty-five miles wide. It contains approximately 2,500,000 acres, or 3,900 square miles.

6. By section 1 of the Act of July 22, 1958, the lands described in the Executive Order of December 16, 1882, were declared to be held by the United States in trust for the Hopi Indians and such other Indians, if any, as theretofore had been settled thereon by the Secretary of the Interior pursuant to such executive order.

7. By the same section of the 1958 act, the Navajo and Hopi Indian Tribes, acting through the chairmen of their respective tribal councils for and on behalf of the tribes, including all villages and clans thereof, and on behalf of any Navajo or Hopi Indians claiming an interest in the area set aside by the executive order dated December 16, 1882, and the Attorney General on behalf of the United States, were authorized to commence or defend in the United States District Court for the District of Arizona, comprised of three judges and convened in accordance with the provisions of 28 U.S.C., section 2284, an action against each other and any other tribe of Indians claiming any interest in or to the area described in such executive order:

> ". . . for the purpose of determining the rights and interests of said parties in and to said lands and quieting title thereto in the tribes or Indians establishing such claims pursuant to such Executive Order as may be just and fair in law and equity. . ."

8. Under section 2 of the 1958 act, the court was authorized to determine whether the Navajo Indian Tribe or individual Navajo Indians have the exclusive interest in any lands within that reservation, it being provided that lands, if any, in which that tribe or individual Indians thereof are determined to have the exclusive interest shall thereafter be a part of the Navajo Indian Reservation. Likewise, and under the same section of the 1958 act, the court was authorized to determine whether the Hopi Indian Tribe, including any Hopi village or clan thereof, or individual Hopi Indians have the exclusive interest in any lands within the reservation, it being provided that lands, if any, in

which that tribe, or any village, clan or individual Indians thereof are determined to have the exclusive interest shall thereafter be a reservation for the Hopi Indian Tribe.

9. This action was instituted pursuant to the authority and jurisdiction thus conferred and for the purposes thus described. The words "Navajo" and "Navaho" refer to one and the same Indian people. The words "Moqui" and "Hopi" refer to one and the same Indian people.

Claims of Parties

10. Plaintiff claims that all of the lands described in the order of December 16, 1882, are held in trust by the United States exclusively for the Hopi Indians and that neither the Navajo Indian Tribe and its villages, clans or individual members, nor any other Indian or Indian tribe, village or clan, has any estate, right, title or interest therein or any part thereof. Plaintiff seeks a decree of this court quieting title to all of these lands in the United States in trust exclusively for the Hopi Indians.

11. Plaintiff further claims that if (but not conceding) some Navajo Indians have been settled on the reservation lands in the manner provided in the order of December 16, 1882, rights and interests thereby acquired, if any, do not inure to the benefit of the Navajo Indian Tribe in general, or to Navajo Indians who have not been settled on the reservation, but only to the group of Navajo Indians actually settled thereon and to their descendants, collectively. Plaintiff also claims that such rights and interests, if any, acquired by a group of Navajo Indians, are not exclusive as to any part of the reservation area, but are co-extensive with those of the Hopi Indians.

12. Defendant Jones concedes that the United States holds in trust for the Hopi Indians a portion of the executive order lands, constituting about 488,000 acres and including the Hopi villages located on three mesas, situated in the south central part of the executive order reservation. The lands so conceded to be held in trust for the Hopi Indians are described as follows:

> "Beginning at the northeast corner of section 19, township 28 north, range 14 east, Gila and Salt River Meridian, Arizona, on the southeast bank of the Dinnebito Wash, surveyed; thence in a southeasterly direction to the northeast corner of

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township 25 north, range 17 east; thence in a northeasterly direction to the northwest corner of section 33, township 27 north, range 19 east, survey of July, 1891; thence due east four miles to the northeast corner of section 36, township 27 north, range 19 east, survey of July, 1891; thence in a northeasterly direction to the northeast corner of section 30, township 27 north, range 20 east, resurvey of July, 1910; thence in a northerly direction approximately 16 miles to the northeast corner of section 6, township 29 north, range 20 east, unsurveyed; thence west approximately 7 miles to the southwest corner of township 30 north, range 19 east; thence north 2 miles to the northeast corner of section 25, township 30 north, range 18 east, survey of March, 1909; thence west approximately 20¼ miles to the point of intersection of the southeast bank of the Dinnebito Wash with the section line between sections 22 and 27, township 30 north, range 15 east, survey of May, 1909; thence down the southeast bank of the Dinnebito Wash to the point of beginning."

13. Defendant Jones claims that all of the lands described in the order of December 16, 1882, except that which is described in paragraph 12 of these findings of fact, are held in trust by the United States exclusively for the Navajo Indian Tribe. No claim is made on behalf of any member of the Navajo Indian Tribe, or any Navajo Indian using or occupying, or who has or has had any claim of any right, title or interest in the use and occupancy of, any part, parcel or portion of the lands described in the order of December 16, 1882, except as a beneficiary under the Navajo tribal claim. He seeks a decree of this court quieting title to all of the executive order lands, except those described in paragraph 12 of these findings of fact, in the United States in trust exclusively for the Navajo Indian Tribe.

14. Defendant United States, the conceded trustee of all the lands described in the order of December 16, 1882, claims no beneficial interest therein. Assuming the position of stakeholder, it takes no position as between the claims of plaintiff and defendant Jones and asserts no claim on behalf of any other Indian or Indian tribe. The United States, however, originally contended that this court is without jurisdiction because, in its view, the rights and interests to be determined herein present a

political and not a judicial question. This court has heretofore rejected this contention. *Healing v. Jones*, 174 F. Supp. 211, decided May 25, 1959.

15. Hereinafter, in these findings of fact, unless otherwise indicated, references to "defendant" will mean Paul Jones, Chairman of the Navajo Tribal Council, and references to the "parties" will mean Dewey Healing and Paul Jones, representing the Hopi and Navajo Indians and Indian Tribes, respectively.

Establishment of Executive Order Reservation of December 16, 1882

16. The executive order reservation of December 16, 1882, was established for the following purposes: (1) to reserve for the Hopis sufficient living space as against advancing Mormon settlers and Navajos, (2) to minimize Navajo depredations against Hopis, (3) to provide a legal basis for curbing white intermeddlers who were disturbing the Hopis, and (4) to make available a reservation area in which Indians other than Hopis could, in the future, in the discretion of any Secretary of the Interior, be given rights of use and occupancy.

17. It was the official intention, in creating this reservation, that the Hopi Indians would immediately have, subject to the limitation stated in the next succeeding paragraph of these findings, the usual Indian title in and to all parts of the described area, whether or not then actually used and occupied by them, and without the need of any action on the part of the Secretary, express or implied, settling them on the reservation or otherwise confirming their rights therein.

18. Notwithstanding what is said in the next preceding paragraph of these findings, it was also the official intention to reserve the authority in the Secretary, acting within his discretion, subsequently to settle other Indians on the reservation or specified points thereof, thereby effecting whatever limitation upon, or reduction in, then existing Hopi rights of use and occupancy the Secretary might thus desire to accomplish consistent with the law in effect at the time the Secretary exercised such reserved authority.

19. In issuing the Executive Order of December 16, 1882, it was not the official intention thereby to grant immediate rights of any kind or nature to Navajos then living upon or otherwise

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using or occupying any part of the reservation area. It was the intention that any such Navajos would remain only by sufferance, subject to being removed upon administrative direction unless and until thereafter settled on the reservation by the Secretary pursuant to his reserved authority under the executive order. It was the intention that any Navajos thereafter entering the reservation area, unless and until settled thereon as stated above, would be trespassers subject to removal upon administrative direction.

Settlement of the Navajos in the 1882 Reservation

20. Navajo Indians used and occupied parts of the 1882 reservation, in Indian fashion, as their continuing and permanent area of residence, from long prior to the creation of the reservation in 1882 to July 22, 1958. The Navajo population in the reservation has steadily increased all of these years, growing from about three hundred in 1882 to about eighty-eight hundred in 1958. During the same period the Hopi population in the reservation increased from about eighteen hundred to something over thirty-two hundred.

21. None of the twenty-one Secretaries of the Interior who served from December 16, 1882 to July 22, 1958, or any official authorized to so act on behalf of any of these Secretaries, expressly ordered, ruled or announced, orally or in writing, personally or through any other official, that, pursuant to the discretionary power vested in him under the executive order he had "settled" any Navajos in the 1882 reservation, or had authorized any Navajos to begin, or continue, the use and occupancy of the reservation for residential purposes.

22. Prior to the years 1909 to 1911, while the second allotment project in the 1882 reservation was in progress, neither the Secretary of the Interior nor any authorized representative of the Secretary, acting in the exercise of the authority reserved under the executive order, expressly or by implication, authorized the Navajo Indian Tribe or any Navajos whether or not then living in the reservation area, to use and occupy any part of the 1882 reservation for residential purposes.

23. The Act of March 1, 1907, 34 Stat. 1015, 1018, authorized the Secretary of the Interior to allot lands in severalty "to the Indians of the Moqui Reservation in Arizona," subject to

the provisions of the Allotment Act of February 8, 1887, 24 Stat. 388. Pursuant to this statute, and on September 16, 1907, the Secretary authorized such a project.

24. On February 25, 1909, Matthew W. Murphy, the special allotting agent, received instructions from Acting Commissioner R. G. Valentine which read in part as follows:

> "Executive Order of December 16, 1882, creates the Moqui or Hopi reserve for the Moqui and such other Indians as the Secretary of the Interior may see fit to settle thereon and the Act of March 1, 1907 (34 Stat. L., 1021), authorizes the Secretary of the Interior to make allotments to the Indians on this reservation in such quantities as may be to their best interest. There is ample authority, therefore, . . . for making allotments in the Moqui reservation to such Navajo Indians as may be located therein and who intend to remain in the reservation. If the Navajos decline to accept allotments in the Moqui reservation of the areas specified herein they can be removed from the reservation, but, in the interests of all persons concerned the Office trusts that they will agree to accept allotments there."

25. The instructions, quoted above, which the Acting Commissioner gave with respect to the second allotment program manifested the intention of the Secretary, proceeding under his authority to settle other Indians, as reserved in the executive order, to confer upon Navajos then residing in the 1882 reservation who intended to remain therein and who agreed to accept allotments therein the right to use and occupy the reservation, consistent with usual Indian title, such rights of use and occupancy, however, being limited to parts of the 1882 reservation not then used and occupied by Hopis. Such rights were not extended to Navajos, though residing in the reservation and intending to remain therein, who declined to accept allotments. The latter were not recognized, pursuant to the authority reserved in the executive order, or otherwise, as having any rights of use and occupancy in the reservation. Nor were such rights extended, at this time, to the Navajo Indian Tribe, as distinguished from individual Navajo Indians.

26. About three hundred Navajos residing in the reservation and who intended to remain there indicated a willingness to receive allotments in the 1882 reservation. Each of them was

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designated to receive a described allotment. In 1911 this second allotment project was abandoned and none of the allotments to Navajos or others were approved.

27. The record does not disclose who the three hundred Navajos were who received tentative allotments in the period from 1907 to 1911, or which of these Navajos, if any, were still alive on July 22, 1958 and living on the 1882 reservation, or then had descendants living in the reservation and, if so, who such descendants were. It is therefore not possible to find that any Navajos residing in the reservation on July 22, 1958 derived rights of use and occupancy by reason of the action of the authorized representative of the Secretary, in the years 1909 to 1911, in conferring such rights upon three hundred Navajos who agreed to accept allotments.

28. On May 25, 1918, 40 Stat. 570, 25 U.S.C., § 211, was enacted, prohibiting the creation of any Indian reservation or the making of any additions to existing reservations in the States of New Mexico and Arizona, except by Act of Congress.

29. On September 29, 1924, an official as high as the Commissioner of Indian Affairs for the first time expressed an official view to the effect that Navajos had rights of use and occupancy in the reservation. This was, in fact, the first of thirteen instances during the twenty-year period from 1924 to 1944, when a Commissioner made an official statement or ruling which expressly, or by necessary implication, recognized Navajos as having rights in the 1882 reservation.

30. The statement of September 29, 1924, was made in answer to a protest which Hopi leaders had made against the plan to convert the Keams Canyon facilities into a school for Navajo children residing in the reservation. Referring to the "such other Indians" provision of the executive order, Commissioner Charles H. Burke said: "It is believed this language was intended to permit Navajo Indians who had lived on the reserve for many years to continue there."

31. In one respect there appears to be an inconsistency between what the Commissioner said and what he did. By his statement he seems to have indicated, in effect, that he was settling in the reservation Navajos who had lived therein for many years prior to 1882. But he was apparently, at the same time, making the school facilities at Keams Canyon available to

all resident Navajo children without regard to the number of years their families had lived in the reservation. This is but the first of several instances in which the Commissioner, while verbally seeming to indicate a limited exercise of the discretionary power in favor of Navajos, sanctioned administrative action consistent with a much broader exercise of such power.

32. The 1924 statement and the surrounding circumstances have some tendency to indicate that some Navajos were then settled in the reservation pursuant to an implied exercise of authority under the executive order. This evidence, however, is not sufficient to warrant a finding of fact that Navajos were then settled in the reservation.

33. By the Act of March 3, 1927, 44 Stat. 1347, 25 U.S.C., § 398d, changes in the boundaries of reservations created by executive order for the use and occupation of Indians were prohibited, except by Act of Congress.

34. What is stated in paragraph 32 of these findings of fact concerning a statement made by the Commissioner on September 29, 1924, is likewise true regarding a statement made by the Commissioner on July 17, 1930, to the effect that ". . . it has always been considered that the Navahos have the right to use part of the reservation."

35. Prior to February 7, 1931, except for the settlement of three hundred unidentified Navajos during 1909-1911, neither the Secretary of the Interior nor any authorized representative of the Secretary, acting in the exercise of the authority reserved under the executive order, expressly or by implication, authorized the Navajo Indian Tribe or any Navajos whether or not then living in the reservation area, to use and occupy any part of the 1882 reservation for residential purposes.

36. On February 7, 1931, Indian Commissioner C. J. Rhoads and Secretary of the Interior Ray Lyman Wilbur, joined in a letter to H. J. Hagerman accepting the recommendations made by Hagerman and Chester E. Faris on November 20, 1930, that the 1882 reservation be divided between Hopis and Navajos. This 1931 blanket and all-inclusive recognition of Navajo rights of use and occupancy is explainable on no other basis than that the Secretary, impliedly exercising the authority reserved to him in the executive order, was then and there settling in the 1882 reservation all Navajos then residing in that reservation.

37. The events and official pronouncements between February 7, 1931 and July 22, 1938, indicate that all Navajos entering the reservation for purposes of permanent residence were impliedly settled therein by the Secretary or his authorized representative, at or shortly after the time of entry, and that on July 22, 1938, all Navajos residing in the 1882 reservation were accordingly settled therein pursuant to the Executive Order of December 16, 1882.

38. Beginning with the approval, on June 2, 1937, of grazing regulations the authority for which rested in part on a resolution of the Navajo Tribal Council, dated November 24, 1935, the Navajo Indian Tribe itself was impliedly settled in the 1882 reservation pursuant to an exercise of the authority conferred by the Executive Order of December 16, 1882.

39. Implied Secretarial settlement of Navajos and the administrative policy of segregating Navajos from Hopis, were initiated at the same time. The implied settlement of Navajos in the 1882 reservation was at all times subject to this segregation policy. Accordingly, there was never any administrative intention to settle Navajos in that part of the reservation in which the Hopi population was concentrated, and neither individual Navajos nor the Navajo Indian Tribe were ever so settled.

40. This limitation upon the area of Navajo settlement was not administratively fixed by the establishment of final and exact boundary lines until April 24, 1943. The boundary line was then finally and exactly fixed by the Office of Indian Affairs in approving revised boundaries for land management district 6, as proposed by Willard R. Centerwall, with certain modifications. District 6, as so defined, was thus reserved exclusively for Hopis.

41. The boundary line of district 6, as approved on April 24, 1943, is as follows:

> Starting at the section corner between Sections 3 and 4, Township 28 North and Range 14 East. This corner is located 24.75 chains due South and then 54.35 chains due West from Windmill M-174. The corner is steel and is located on the West bank of the Dinehbito Wash. It is located a few chains West of the wash. The boundary runs South of this corner to the center of the wash which distance is about 2 chains. From the above mentioned corner the boundary runs North 25° 10′ West to Howell Mesa escarpment in

Section 20, Township 29 North, Range 14 East. It then goes in a northerly direction along said escarpment until the Tuba City-Hotevilla road is intersected in the South half of Section 28, Township 30 North, Range 14 East. The boundary then follows the road until it reaches the center of the Dinehbito Wash about on the section corner common to Sections 22, 23, 26 and 27, Township 30 North, Range 15 East. The boundary then follows the center of the Dinehbito Wash in a northeasterly direction until it intersects a line going North 45° West from the quarter corner between Sections 17 and 20, Township 30 North and Range 16 East. This line is approximately 43 chains long. The boundary then follows said line Southeast to the quarter corner between Sections 17 and 20, Township 30 North, Range 16 East. The boundary then follows the section line due East from the said quarter corner for 4.5 miles to the section corner common to Sections 13 and 24, Township 30 North, Range 16 E, and Sections 18 and 19, Township 30 North, Range 17 East, then turns an angle and goes North 42° East for a distance of approximately 2.2 miles until the escarpment on the East side of the valley is encountered in the NW¼ of Section 8, Township 30 North, Range 17 East. The boundary then follows this escarpment in a southerly direction until the most southerly point in the escarpment is reached in the E/2 of Section 16, Township 30 North, Range 17 East. The boundary then goes .4 miles South 23° East at which point it reaches the Oraibi Wash in the NW¼, Section 22, Township 30 North, Range 17 East. The boundary then follows the West bank of the Oraibi Wash in a northeasterly direction until a point 200 yards above the Hardrocks Diversion Dam is reached. The boundary then turns an angle and follows a line South 57° 30′ East for a distance of approximately five miles until it reaches the buck pasture fence in the SW¼, Section 15, Township 30 North, Range 18 East.

The boundary then follows the buck pasture fence Southwesterly for approximately .4 miles in the NW¼, Section 22, Township 30 North, Range 18 East. Thence Southeasterly along the buck pasture fence for approximately .4 mile in the NW¼, Section 22, Township 30 North, Range 18 East. Thence Northeasterly along the buck pasture fence for ap-

proximately 3 miles to a point in the NW¼, Section 18, Township 30 North, Range 19 East. Then Southeasterly along the buck pasture fence for approximately 1 mile to the SE¼, Section 18, Township 30 North, Range 19 East. Thence Northeasterly along the buck pasture fence approximately .2 mile to the point on the section line between the SW quarters of Sections 17 and 18, Township 30 North, Range 19 East. Then South 76° 30′ East following the Existing Boundary fence to a point 1,879 feet due North of Section corner between Sections 23, 24, 25 and 26, Township 30 North, Range 19 East. This section corner is located near water well II 11 which is known as Cat Springs. Then South 54° 15′ East following the Existing Boundary fence to a point in Bingham's Lake approximately 8 miles South of Latitude 36° 00′ and 4.25 miles West of Longitude 110° 00′.

From this point in Bingham's Lake the boundary then runs South 38° 00′ West following the Existing Boundary fence until it intersects the Jeddito Wash. The intersection takes place at the same point as Longitude 110° 15′ intersects the wash. The boundary then follows the center of the wash to the point where the Township line between Townships 24 and 25 North intersects the wash. The boundary then follows the Township line due West following the Existing Boundary fence for 2.3 miles at which point it goes North 45° 57′ West following the Existing Boundary fence for approximately 25.6 miles until it intersects the Dinehbito Wash at the same point as the Township line between Townships 27 and 28 North. The boundary then follows the center of the Wash 8 miles up to the point where it intersects the line running due South of the corner between Sections 3 and 4 Township 28 North, Range 14 East.

42. The Navajo Indian Tribe and all individual Navajos residing in the area on July 22, 1958, were authorized to settle in all parts of the reservation outside of district 6 as defined on April 24, 1943, and neither the Navajo Indian Tribe nor individual Navajo Indians were authorized to settle within that district as so defined.

43. No Indians or Indian tribes other than Navajos were ever settled in the 1882 reservation pursuant to the authority vested

in the Secretary under the Executive Order of December 16, 1882, and no Indians or Indian tribes other than Hopis and Navajos have any right or interest in the 1882 reservation.

Other Events and Circumstances Bearing upon Relative Rights and Interests of Hopis and Navajos in Part of Reservation outside of District 6, as Defined in 1943

44. Only a very few Hopis have ever resided, or grazed livestock, in that part of the reservation lying outside of district 6, as defined on April 24, 1943. During the years, however, they have continuously made some use of a large part of that area for the purpose of cutting and gathering wood, obtaining coal, gathering of plants and plant products, visiting ceremonial shrines, and hunting.

45. Congress at no time enacted legislation designed to, or having the effect of, terminating Hopi rights of use and occupancy anywhere in the 1882 reservation.

46. Beginning on February 7, 1931, administrative officials followed a policy designed to exclude Hopis, for the most part, from the part of the reservation in which Navajos were being settled by implied Secretarial action. At first they sought to accomplish this by legislation in the form of a provision in the bill which was to become the Navajo Indian Reservation Act of 1934. This attempt failed of realization. Thereafter, and beginning about 1937, the administrative effort to exclude Hopis from the part of the reservation in which Navajos were being permitted to settle, took the form of grazing regulations and a permit system under which Hopi use of reservation lands was restricted.

47. In 1941, Indian Affairs officials sought to formalize this exclusion policy by means of an order of the Secretary of the Interior defining areas of exclusive occupancy. But the solicitor of the department, on February 12, 1941, ruled that this could not be done without the consent of the Hopis, and no such consent was sought or obtained. Despite this legal advice the Office of Indian Affairs, through enforcement of the grazing regulations and permit system, continued the practice of excluding Hopis without their consent from that part of the reservation lying outside of district 6, insofar as residential or grazing use was concerned.

48. None of these administrative regulations and practices, however, were designed to affect whatever rights the Hopis then had in the entire 1882 reservation. This is established by the repeated and consistent representations made by administrative officials during all of this period.

49. The failure of the Hopis, prior to the settlement of Navajos, to use a substantially larger part of the 1882 reservation than is embraced within district 6, was not the result of a free choice on their part. It was due to fear of the encircling Navajos and inability to cope with Navajo pressure.

50. After the official settlement of Navajos in the 1882 reservation, the failure of the Hopis to make substantial use of the area beyond district 6 was not due to a lack of desire or a disclaimer of rights on their part, but to their exclusion from that area by Government officials. Throughout this entire period they continued to assert their right to use and occupy the entire reservation area. These Hopi protestations would doubtless have been even more persistent and vehement had it not been for the constant assurances given to them by Government officials, that their exclusion from all but district 6 was not intended to prejudice the merits of the Hopi claims.

51. As a practical matter, the Secretarial settlement, of Navajos in the part of the 1882 reservation outside of district 6, even without Governmental restraint, probably would have greatly limited the amount of surface use the Hopis could have made of that part of the reservation. But there still would unquestionably have been a substantial movement of Hopis into the area had it not been for the administrative barrier and improper Navajo pressure.

52. Neither before nor after the Secretarial settlement of Navajos, did the Hopis abandon their previously-existing right to use and occupy that part of the 1882 reservation in which Navajos were settled.

CONCLUSIONS OF LAW

1. This United States District Court for the District of Arizona, comprised of three judges and convened in the manner authorized by section 1 of the Act of July 22, 1958, 72 Stat. 402, and 28 U.S.C., section 2284, has jurisdiction to entertain and determine this action.

2. By the force and effect of the Executive Order of December 16, 1882, and without the necessity of any concurrent or subsequent act of the Secretary of the Interior settling it thereon, and without restriction to the parts of the reservation then used and occupied by it, the Hopi Indian Tribe, on December 16, 1882, for the common use and benefit of the Hopi Indians, acquired the non-vested right to use and occupy the entire reservation described in that executive order, both as to the surface and subsurface including all resources, subject to the paramount title of the United States, and subject to such diminution in the rights of use and occupancy so acquired as might thereafter lawfully result from the exercise of the authority reserved in the Secretary to settle other Indians in the reservation.

3. Neither the Navajo Indian Tribe nor any individual Navajo Indians, whether or not living in the reservation area in 1882, gained any immediate rights of use and occupancy therein by reason of the issuance of the Executive Order of December 16, 1882, or by reason of any other fact or circumstance, save and except by the exercise, after December 16, 1882, of the authority reserved in the Secretary of the Interior, under the Executive Order of December 16, 1882, to settle other Indians in that reservation.

4. Prior to the years 1909 to 1911, neither the Secretary of the Interior nor any authorized representative of the Secretary, acting in the exercise of the authority reserved under the executive order, expressly or by implication, settled the Navajo Indian Tribe or any individual Navajo Indians anywhere in the 1882 reservation.

5. In the years 1909 to 1911, the Secretary of the Interior, acting through his authorized representative, impliedly settled in the 1882 reservation about three hundred individual Navajo Indians who then resided in the reservation and intended to remain therein, and who had agreed to accept allotments therein of land not then being used or occupied by Hopi Indians, but since these Navajo Indians are unidentified in this record, and since it is not established in this record that any of these three hundred Navajo Indians or their descendants, also unidentified, were residing in the 1882 reservation on July 22, 1958, the settlement of such Indians in 1909-1911, created no rights of use and occupancy which are cognizable in this suit.

6. Except for Navajo Indians, if any, who may have been settled in the years 1909-1911 in that part of the 1882 reservation

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referred to in this paragraph, and whose rights in any event are not now cognizable, neither the Secretary of the Interior nor any authorized representative of the Secretary, acting in the exercise of the authority reserved under the Executive Order of December 16, 1882, ever expressly or by implication settled the Navajo Indian Tribe or any individual Navajo Indians in land management district 6 of the 1882 reservation, as such district was defined on April 24, 1943, such district being described in paragraph 41 of the findings of fact herein.

7. Beginning on February 7, 1931, and continuing to July 22, 1958, all Navajo Indians who entered that part of the 1882 reservation lying outside of district 6, as defined on April 24, 1943, for purposes of permanent residence, were impliedly settled therein by the Secretary of the Interior or his authorized representative at or shortly after the time of entry, and on July 22, 1958, all Navajo Indians then residing in the indicated part of the 1882 reservation were accordingly settled therein pursuant to the Executive Order of December 16, 1882.

8. Beginning on June 2, 1937, the Navajo Indian Tribe, for the common use and benefit of the Navajo Indians, was impliedly settled in that part of the 1882 reservation lying outside of district 6, as defined on April 24, 1943, pursuant to the valid exercise of the authority conferred in the Secretary by the Executive Order of December 16, 1882.

9. No Indians or Indian tribes other than Navajos were ever settled in the 1882 reservation pursuant to the authority vested in the Secretary of the Interior under the Executive Order of December 16, 1882, and no Indians or Indian tribes other than Hopis and Navajos have any right or interest in the 1882 reservation.

10. On July 22, 1958, the Hopi Indian Tribe, for the common use and benefit of the Hopi Indians, had the exclusive interest in and to that part of the 1882 reservation lying inside district 6, as defined on April 24, 1943, subject to the trust title of the United States, and pursuant to section 2 of the Act of July 22, 1958, such area is accordingly a reservation for the Hopi Indian Tribe.

11. The rights of the Hopi Indian Tribe, acquired on December 16, 1882, under the executive order of that date, to use and occupy the entire 1882 reservation for and on behalf of the

Hopi Indians, were never terminated by Congressional enactment, administrative action, or abandonment, but after February 7, 1931, the Hopi Indian Tribe was validly required to share equally with settled Navajo Indians and, after June 2, 1937, with the settled Navajo Indian Tribe, the use and occupancy of that part of the reservation in which individual Navajos and the Navajo Indian Tribe were validly settled.

12. The virtual exclusion of Hopi Indians, accomplished by administrative action extending from 1937 to 1958, from use and occupancy, for purposes of residence and grazing, of that part of the 1882 reservation lying outside of district 6, as defined on April 24, 1943, has at all times been illegal.

13. Neither the Navajo Indian Tribe nor any individual Navajo Indians have the exclusive interest in and to any part of the 1882 reservation.

14. The Hopi Indian Tribe and the Navajo Indian Tribe, for the common use and benefit of their respective members, but subject to the trust title of the United States, have joint, undivided, and equal interests both as to the surface and subsurface, including all resources, in and to that part of the reservation lying outside of land management district 6, as defined on April 24, 1943, and described in paragraph 31 of the findings of fact herein.

15. The quieting of title in and to the lands within the 1882 reservation, in the Hopi and Navajo Indian Tribes, in accordance with the conclusions of law stated above will be just and fair in law and equity.

FREDERICK G. HAMLEY, Circuit Judge,

LEON R. YANKWICH, District Judge,

JAMES A. WALSH, District Judge.

September 28, 1962

APPENDIX "D"

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA
Plaintiff-Appellee

v. No. 26,235

JOE and WANDA KABINTO, his wife; HARRY BAHE: JOHN YELLOWHAIR and MARY ETTA YELLOWHAIR, his wife; MARY KABINTO YESSLITH: INEZ KABINTO NELSON: KATIE NELSON: VINTON NELSON: JACK FRANK and LETA FRANK, his wife; DAVID GEORGE and ELIZABETH REDHORSE GEORGE, his wife; DAN JOE GRAYHAIR and AGNES GEORGE GRAYHAIR, his wife; and ROSE GEORGE BAKER,
Defendants-Appellants

ORDER DENYING PETITION FOR REHEARING

Before: BROWNING and HUFSTEDLER,
Circuit Judges, and
FERGUSON, District Judge.*

The appellants' petition for rehearing is hereby denied.

Dated: March 22, 1971.

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United States Circuit Judges

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United States District Judge

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*Honorable Warren J. Ferguson, United States District Judge, Central District of California, sitting by designation.

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FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

[illegible] KOLENKO, his wife; [illegible] JOHN YELLOWHAIR and [illegible] YELLOWHAIR, his wife; [illegible] YESSLITH; [illegible] [illegible] WILSON; [illegible] WILSON; JACK FRANK and [illegible], his wife; DAVID [illegible] and ELIZABETH REDHORSE [illegible], his wife; DAN JOE GRAYHAIR [illegible] GEORGE GRAYHAIR, his wife; and JOSE GEORGE BAKER,

Defendants-Appellants

No. 26,235

FILED

MAR 23 1972

WM. B. LUCK, CLERK

ORDER DENYING PETITION FOR REHEARING

Before: [illegible]NING and HUFSTEDLER, Circuit Judges, and [illegible]CUSON, District Judge.

The appellants' petition for rehearing is hereby [illegible].

[illegible] Feb. 22, 1971.

United States Circuit Judge

United States District Judge

[illegible] United States District Judge

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